

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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JUL 26 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)
 Howard B. Dolgoff)
 Mark and Renee Carter)
 For Construction Permit for a New)
 FM Station on Channel 292A in)
 Miramar Beach, Florida)

File No. BPH-911223ME

File No. BPH-911224MD

MM 93-178

To: Administrative Law Judge
 John M. Frysiak

CONTINGENT MOTION TO ENLARGE ISSUES

Applicants Mark and Renee Carter ("the Carters"), pursuant to Section 1.229(b) of the Commission's rules, 47 C.F.R. Section 1.229, hereby seek addition of issues against Howard B. Dolgoff ("Dolgoff"). This Motion is filed contemporaneously with the Carters' Opposition to Motion for Partial Summary Decision and Countermotion for Summary Decision, and is made contingent on denial of summary decision therein sought against Dolgoff by reason of Dolgoff's incurable lack of reasonable assurance of a site and, as to Part II hereof, on the outcome of the Carters' Request to Certify Application for Review now pending before the Presiding Judge.

I. SITE AVAILABILITY AND CERTIFICATION ISSUES**A. Issues Sought**

By amendment of May 1, 1992, filed as of right on May 4, 1992, Dolgoff deleted the engineering portion and site

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certification of his application as originally filed, and substituted a completely new technical proposal and site certification. He specified a site at coordinates 30° 23' 31" North Latitude by 86° 18' 25" West Longitude.

On Figure 2, a site map appended to his amendment,^{1/}

~~Spence indicated the new site as located north of the~~

It appears, therefore, that Dolgoff lacks and, at the

~~_____ with his accompanying _____~~

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II. HARD LOOK VIOLATION ISSUE

A. Issue Sought

Dolgoff's May 1992 amendment deleting his original, 3kW engineering proposal and substituting a 6kW directionalized proposal from a completely different site, was filed within the 30 day period after public notice of tender for filing (which in the case of these applications was given by Public Notice, Report No. 15230, on April 3, 1992) allowed by Section 73.3522(b) of the Commission's rules, 47 C.F.R. Section 73.3522(b). Dolgoff proposed a 6kW directional pattern so that he could invoke the grandfathering of 3kW proposals provided for in Section 73.213(c) of the rules, 47 C.F.R. Section 73.213(c). He nevertheless failed to request processing under Section 73.215, 47 C.F.R. Section 73.315, the only provision of the rules authorizing directionalized FM proposals. In addition, he failed to make the basic engineering showing required by Section 73.215 for directionalized proposals thereby omitting a "hard look" requirement expressly imposed by the Commission and governing acceptance of these applications. Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas, 4 FCC Rcd 1681, 1686 (and Appendix C) (1989).^{4/}

^{4/} See the Carters' Reply to Opposition to Petition to Deny at 4-5 (filed July 21, 1992). This same Reply at page 6 shows that the Commission's relaxation of the hard look rules on July 16, 1992, had no effect on currently pending applications and hence none on these applications. FCC Relaxes its Hard Look Approach to Processing Commercial FM Applications, Report No. DC-2173, MM Docket No. 91-347, at 2 (released July 16, 1992).

The details of Dolgoff's rule violations, including actual prohibited overlap of WKNU(FM)'s projected 6kW interference contour by his proposed protected service contour, are set forth in the Carters' pending Request to Certify Application for Review, filed with the Presiding Judge on July 6, 1993, as well as in the Carters' Petition to Deny previously filed with the Commission on June 4, 1992.^{2/} The pertinent facts and controlling law are fully set forth therein, and need not be repeated here.^{3/} Depending on the outcome of the pending

^{2/} See also the Letter of July 8, 1993 from the licensee of WKNU(FM) to Chairman Ouello, a copy of which was furnished to the

Request for Certification and any proceedings following grant thereof, the Presiding Judge should add a hearing issue whether Dolgoff violated the hard look rules by failing to request processing under Section 73.215 of the rules 47 C.F.R. Section 73.215, and by failing to make the required contour protection showing. Certification is appropriate where (as the Carters contend) pure questions of law emerge as clearly controlling; but if the Presiding Judge feels that the issues of law are not so clear, and that the Carters' Request for Certification (and instant contingent issue request) present novel or complex issues of mixed fact and law that should first be evaluated in the hearing process, he should designate an issue rather than certify the matter to the Commission. See Atlantic City Community

6/ (...continued)

gain it nunc pro tunc status since applicants were afforded 30 days after the release of the Notice of Tenderability to amend their applications into acceptable form. To permit curative amendments after that period poses too great a threat to the orderly functioning of our new processing procedures.

Report and Order in MM Docket No. 84-750, 50 FR 19936, 58 RR 2d 776, 785 (1985) (Emphasis added).

Broadcasting, Inc., FCC 93-335 MM, Docket No 88-433, at paras.

27-33 (released July 9, 1993).^{1/}

Accordingly, it is requested that the following additional issue be added:

To determine whether Dolgoff's failure to seek processing of his application as amended under Section 73.215, his failure to provide a contour protection showing with respect to his directional proposal, and his failure to avoid prohibited overlap of his own proposed protected service contour with WKNV(FM)'s projected interference contour at 6kW, constituted violations of Section 73.215, and of the hard look rules, with the result that Dolgoff's application must be dismissed.

B. Requested Discovery

The Carters' respectfully request that Dolgoff be required to produce all documents in his, or his or his engineering consultant or other agents', possession, or under his or said agents' control, pertaining in any way to the reason for not making the usual contour protection showing required for directional FM proposals (depicting not only the proposed

^{1/} The Mass Media Bureau is also certainly "wrong" in contending that Dolgoff's violation of the hard look criteria by an amendment filed during the 30 day amendment-as-of-right period would be harmless error because, as a "suicide amendment," the amendment would have to be returned under Algeria I, Inc., 5 FCC Rcd 7309 (1990). Algeria I was not a hard look case, and hence is entirely inapposite. The hard look rules govern this proceeding, and, as shown in note 4 supra, the Carters have an undiminished and absolute right to invoke and demand enforcement of those rules.

Moreover, there is no reason to believe that the earlier site specified by Dolgoff, for his 3kW proposal, is still available to him, or that Dolgoff would wish to pursue that earlier proposal. The Bureau's effort to down play the significance of the processing staff's error fails at the practical procedural level, as well as at the antecedent substantive one.

station's protected and interfering contours, but also those of the station protection of which prompted directionalization) when selecting, preparing, and filing the site and technical proposal incorporated in Dolgoff's May 1992 amendment, and that Dolgoff and his engineering consultant or other agents be required to appear at a time and place to be agreed upon for depositions inquiring into these and other relevant matters.

III. EEO AND NONDISCLOSURE ISSUES

A. Issues Sought

Dolgoff is an officer and sole stockholder of Dolcom Broadcasting, Inc. ("Dolcom"), and he is General Manager of Dolcom's station WTHZ-FM (formerly WUMX(FM)), in Tallahassee, Florida.^{8/} By Notice of Apparent Liability in the amount of \$18,000.00 issued December 26, 1990, in Letter to Howard B. Dolgoff, 5 FCC Rcd 7695 (1990), the Commission found the station managed by Dolgoff, WTHZ-FM (formerly WUMX(FM)), guilty of "egregious" inadequacy of EEO efforts by reason of wilful and repeated violations of Section 73.2080 of the rules, 47 C.F.R. Section 73.2080, and issued it only a short-term renewal.^{9/}

This adverse information involving wilful and repeated violations of the Commission's rules should have been disclosed in Dolgoff's application as initially filed, or as amended, but

^{8/} See Dolgoff's 301 application, Exhibit 1 (filed December 23, 1991).

^{9/} The Commission's action was affirmed upon dismissal of Dolgoff's request for elimination or reduction of the \$18,000.00 forfeiture (Dolgoff did not contest the short-term renewal). Notice of Forfeiture, 7 FCC Rcd 5978 (1992).

was not.^{10/} In any event, this adverse Commission finding raises an issue as to Dolgoff's basic qualifications to be a Commission licensee. Appropriate issues should therefore be added.

Whether Dolgoff, as the principal of Dolcom Broadcasting, Inc. ("Dolcom"), licensee of WTHZ-FM (formerly WUMX(FM)) in Tallahassee, Florida, and as General Manager WTHZ-FM (formerly WUMX(FM)), is guilty of wilful and repeated violations of Section 73.2080 of the rules forming the basis for the Commission's assessment of an \$18,000.00 forfeiture against Dalcom and imposition of a short-term renewal, and violated Sections 1.65 and 73.3514 by failing to disclose these facts in his application.

Whether Dolgoff, in light of evidence adduced, has the basic qualifications to be a Commission licensee.


B. Requested Discovery

The Carters request that Dolgoff, and the Mass Media Bureau, be required to produce all documents in their possession or control pertaining in any way to the wilful and repeated violations of the Commission's rules disclosed in connection with the Commission's investigation of the \$18,000.00 forfeiture and short-term renewal of WTHZ-FM's license.

^{10/} FCC Form 301 and Sections 1.65 and 73.3514 of the Commission's rules require prompt reporting to the Commission of adverse matters which may be of decisional significance in respect of applications.

WHEREFORE, it is respectfully requested that the requested issues be added, and that production of the requested documents, and other discovery hereby sought, be ordered.

Respectfully submitted,



Frank J. Martin, Jr.
for Mark and Renee Carter

Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404

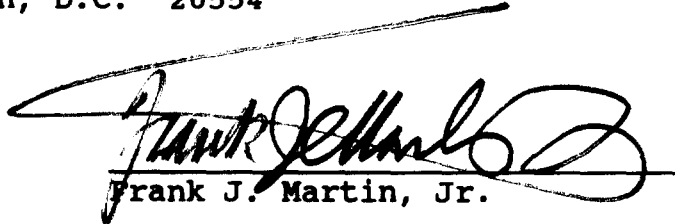
CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 1993, a copy of the foregoing Petition to Enlarge Issues has been served by U.S. mail, postage paid, upon the following:

Irving Gastfreund, Esq.
Kaye, Sholer, Fierman, Hays & Handler
901 15th Street, N.W.
Washington, D.C. 20005

Paulette Laden, Esq.*
Hearing Branch, Enforcement Division
Mass Media Bureau
2025 M Street, N.W., Suite 7212
Washington, D.C. 20554

Chief, Data Management Staff*
Federal Communications Commission
Audio Services Division
Mass Media Bureau
1919 M Street, N.W., Room 350
Washington, D.C. 20554



Frank J. Martin, Jr.

* By hand delivery

OFFICE OF THE
PROPERTY APPRAISER
WALTON COUNTY

WILLIAM S. FOUNTAIN, CFA
PROPERTY APPRAISER



COURTHOUSE
TEL. (904) 892-8123

P.O. BOX 691

DEFUNIAK SPRINGS, FLORIDA 32433

July 22, 1993

Re: 24-2S-21-42000-042-0000

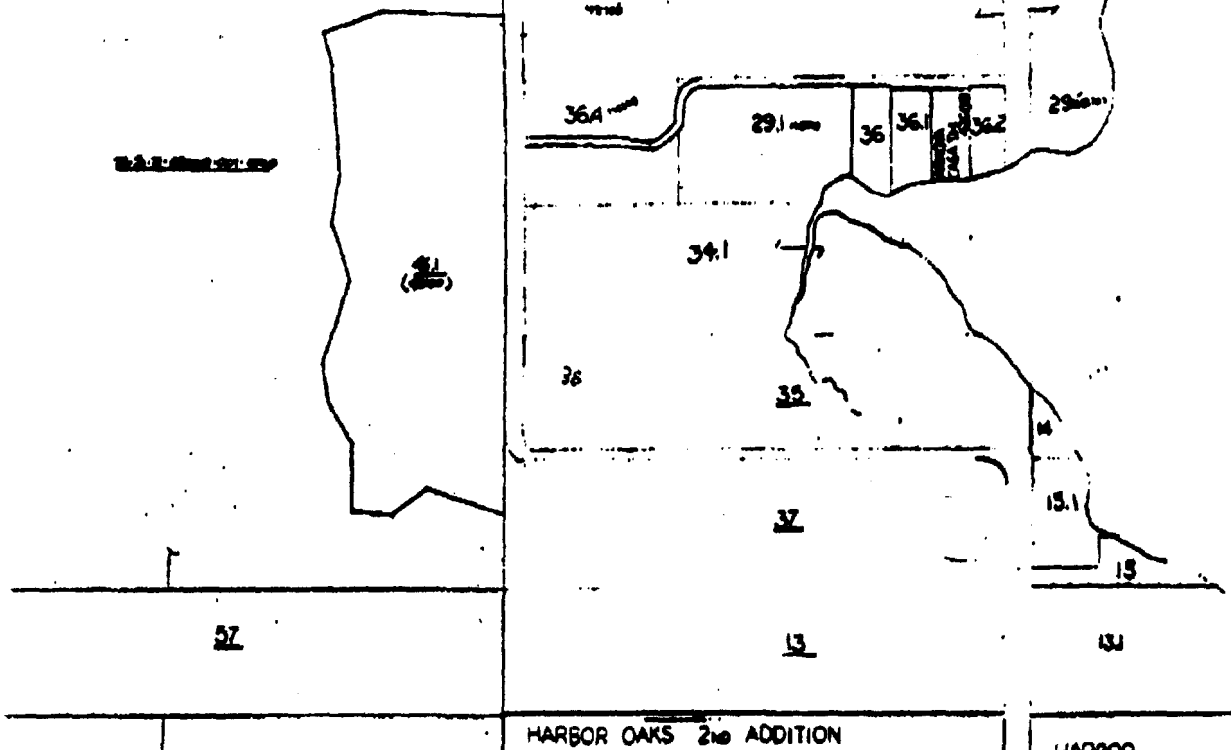
TO WHO IT MAY CONCERN:

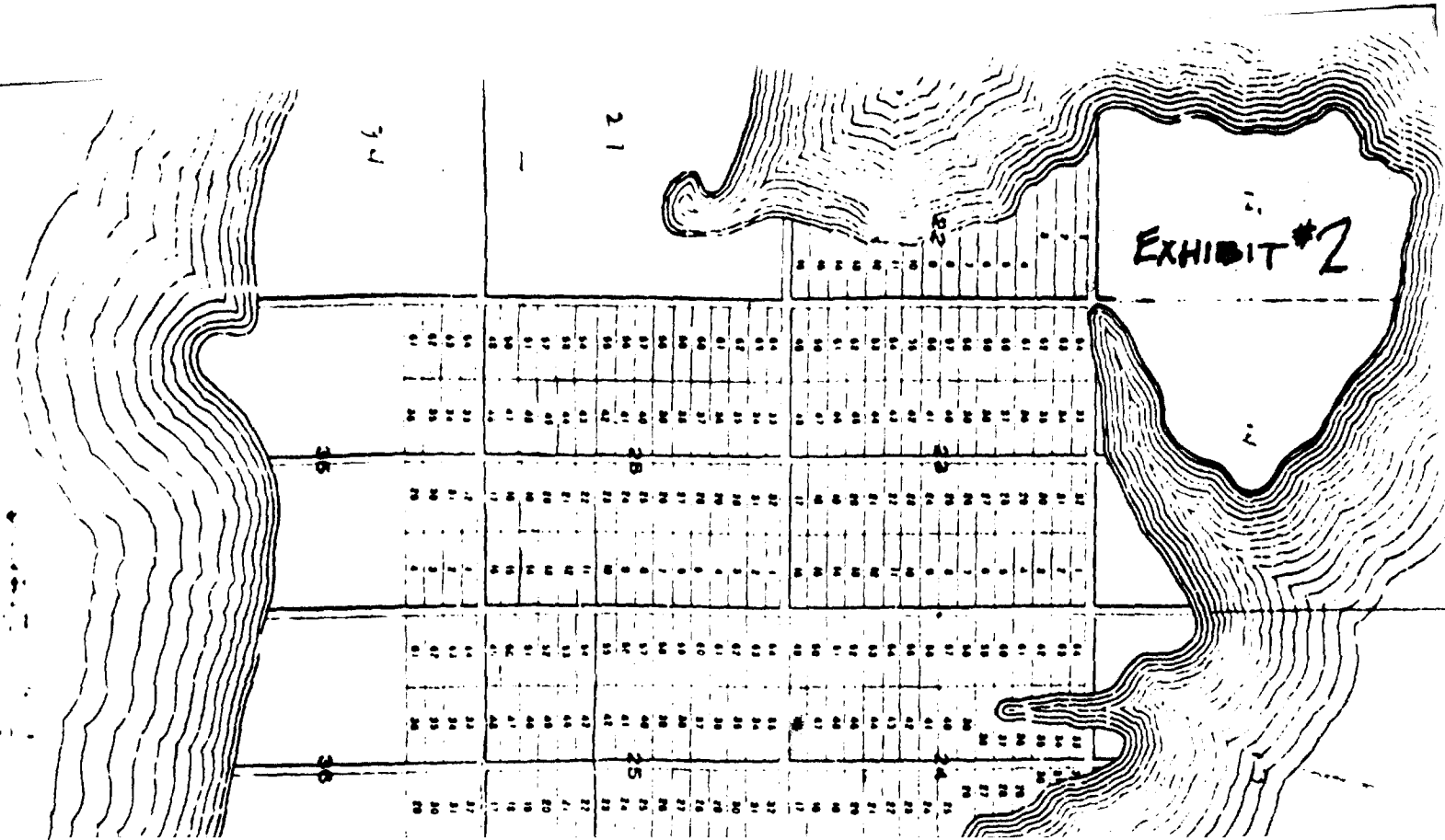
Pursuant to the information contained in the 1992 Walton County, Florida assessment roll, James R. King who's address is 336 Lewis Street, Ft. Walton Beach, Florida 32547-3143, is assessed with Lot 48 less 150 feet North & South by 90 feet East & West in SW corner, Santa Rosa Plantation, Section 24, Township 2 South, Range 21 West. This parcel is denoted as #42 of Exhibit 1 as furnished me.

Attached is a copy of a portion of the Santa Rosa Plantation Plat as recorded in Plat Book 2 Page 4 Walton County records. As evident by said copy of map Lot 48 (yellow in color) is the $S\frac{1}{4}$ of $SE\frac{1}{4}$ of $SW\frac{1}{4}$. It would appear from a careful examination of Exhibit #2 as furnished me that the position of the target is north of Lot 48 ($S\frac{1}{4}$ of $SE\frac{1}{4}$ of $SW\frac{1}{4}$).



Property Appraiser
Walton County





Fourmile Pt. 25 Fourmile Pt

30° 25' 00"

EXHIBIT #3

86° 17' 30"

Site Coordinates
30° 23' 31" N
86° 18' 25" W

23

26

13

24

19

Bayou Mack

Bayou

SUTHERLAND, ASBILL & BRENNAN

1275 PENNSYLVANIA AVENUE, N. W.

WASHINGTON, D. C. 20004-2404

(202) 383-0100

CABLE: SUTAB WASHINGTON
TELEX: 89-501
FACSIMILE:
(202) 637-3593

1275 PENNSYLVANIA AVENUE, N.E.
ATLANTA, GA 30309-3996
(404) 853-8000

July 9, 1993

FRANK J. MARTIN, JR.

DIRECT LINE: (202) 383-0146

Stamp and Return

VIA HAND DELIVERY

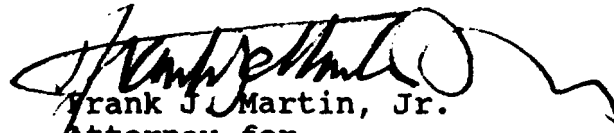
The Honorable John M. Frysiak
Federal Communications Commission
2000 L Street, NW
Washington, DC 20554

Re: Miramar Beach, Florida
MM Docket No. 93-178

Dear Judge Frysiak:

Yesterday we received a copy of a letter from Hugh Ellington, the licensee of WKNV-FM, to Chairman Quello, objecting to the FCC's acceptance of the application of Howard B. Dolgoff in the above-captioned proceeding. Since you were not served directly with a copy of this letter, we are providing one herewith.

Respectfully submitted,


Frank J. Martin, Jr.
Attorney for
Mark and Renee Carter

FJH/jtp
Enclosure

cc: Irwin Gastfreund, Esq.,
Counsel for Howard B. Dolgoff
Mr. Hugh Ellington

WKNU_{FM}

P. O. Box 466 • Brewton, Alabama 36427 • Phone (205) 887-4824 • 106.3 MHz • 3000 WATTS H & V

July 8, 1993

Chairman James H. Quello
Federal communication Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Howard B. Dolgoff, File No. BPH-911223ME, MM
Docket No. 93-178 (Miramar Beach, Florida, FM
Proceeding)

Dear Chairman Quello:

I am the licensee of WKNU(FM), a Class A station on FM Channel 292A licensed to Brewton, Alabama. I have learned that in a Hearing Designation Order released June 28, 1993, in MM Docket No. 93-178, despite timely objection made by the competing Carter applicants, the Commission's staff has accepted an application by Howard B. Dolgoff for a new 6KW directional FM station on Channel 292A in Miramar Beach, Florida, that directly and adversely affects WKNU by depriving it of its reciprocal right pursuant to MM Docket No. 88-375 to increase power to 6kW.

The Miramar Beach applications are for a channel allocation sought before the Commission's relevant actions in MM Docket No. 88-375. As a result of the new short spacing requirements adopted in MM Docket No. 88-375, the Miramar Beach allocation is short-spaced to WKNU, but applicants were "grandfathered" under amended Section 73.213 (c) (1) of the Rules provided that in relevant directions they proposed not more than 3kW effective radiated power.

The Carter applicants complied with the grandfathering limitation to 3kW by proposing 3kW non-directional facilities. However, Dolgoff submitted a 6kW directional proposal that, while it proposed the grandfathered 3kW effective radiated power in an arc toward WKNU, in an adjacent area where more than 3kW will be emitted, it will cause prohibited overlap of Dolgoff's protected 60dBu contour by WKNU's projected 40 dBu interference contour at

WKNU_{FM}

P. O. Box 488 • Brewton, Alabama 36427 • Phone (205) 887-4824 • 105.3 MHz • 5000 WATTS P & V

Chairman James H. Quello
July 8, 1993
Page 2

Please be advised that WKNU strongly objects to the staff action. I hereby call upon the Commission to reject Mr. Dolgoff's application as patently in violation of the Commission's rules.

Respectfully submitted,


Hugh Ellington,
President

CC: Paulette Laden, Esq.
Hearing Branch, Enforcement Division
Mass Media Bureau
2025 M Street, N.W., Suite 7212
Washington, D.C. 20554

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Washington, D.C. 20005
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